FILED
DEC 30 2002
CLERK

No. 02-784

IN THE

Supreme Court of the United States

CITY OF AKRON and JOHN V. FRANK, MARCO SOMMERVILLE, JOHN W. VALLE, ROBERT G. KONSTAND, GERALD HOLLAND, NANCY HESLOP, and CHARLES WALKER,

Petitioners,

v.

BRUCE KILBY, MIKE PARSONS, PATRICIA LONGVILLE, GREGORY D. COLERIDGE, and "YES ON ISSUE 11 CAMPAIGN,"

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

MAX ROTHAL,
DIRECTOR OF LAW, CITY OF AKRON
CHERI B. CUNNINGHAM,
ASSISTANT DIRECTOR OF LAW,
CITY OF AKRON
161 South High Street, Suite 202
Akron, Ohio 44308
(330) 375-2030

Counsel for Petitioner
City of Akron

ROBERT M. GIPPIN
Counsel of Record
KAREN KELLY GRASSO
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
(216) 566-5500

Counsel for Petitioners
John V. Frank, et al.

178188

COUNSEL PRESS
(800) 274-3321 • (800) 359-0859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
I. Respondents' Allegations Of Corruption Do Not Support The Constitutionality Of The Contribution Limits.	1
II. The Decision Of This Court in *Shrink Missouri* Did Not Eliminate The Obligation Of Courts To Evaluate The Constitutionality Of Contribution Limits.	5
III. Mandatory Disclosure Of Home Addresses Impermissibly Burdens Expression.	7
IV. This Petition Provides The Opportunity To Address A Critical Element Of Campaign Finance Reform.	9
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) 2, 3, 5, 8

Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995), *cert denied*, 518 U.S. 1033(1996) 2

Daggett v. Comm'n on Governmental Ethics and Election Practice, 205 F.3d 445 (1st Cir. 2000) ... 5

Federal Election Comm'n v. Beaumont, 278 F.3d 261 (4th Cir.), *cert. granted*, No. 02-403 (Nov. 18, 2002) 9

Florida Right to Life, Inc. v. Mortham, 2000 WL 33733256 (M.D. Fla. March 20, 2000) 7

Frank v. City of Akron, 95 F. Supp. 706 (N.D. Ohio 1999) ..... *passim*

General Electric Co. v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) 3

Landell v. Sorrell, 118 F. Supp. 2d 459 (D. Vt. 2000) 7

Landrell v. Sorrell, 2002 WL 31268493 (2d Cir. October 3, 2002) 7

Cited Authorities

Page

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) 2

Montana Right to Life Assoc. v. Eddleman, 306 F.3d 874 (9th Cir. 2002) 7

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000) 1, 3, 5, 6

United States Constitution:

First Amendment 1, 9

Respondents fail to demonstrate that *certiorari* is unwarranted. Rather, they rely upon an irrelevant and inadmissible evidentiary record, not relied upon by the Sixth Circuit, to support contribution limits well below those that have ever been upheld — based on irrelevant allegations of corruption.

More critically, Respondents wrongly suggest that *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000) eliminated a court's ability to determine when a contribution limit is so low that it is constitutionally impermissible. And, Respondents implicitly — and wrongly — suggest that since *Shrink Missouri*, the government is no longer required to demonstrate that restrictions on political speech are narrowly tailored to serve a compelling public interest. Instead, Respondents claim that challengers must now demonstrate the impropriety of contribution limits — turning First Amendment jurisprudence on its head.

If anything, Respondents' arguments highlight the vital importance of this Court's guidance as campaign finance reform continues.

I. Respondents' Allegations Of Corruption Do Not Support The Constitutionality Of The Contribution Limits.

Respondents claim that there is a record of rampant political corruption in Akron, a point Petitioners vigorously dispute. Respondents claim, moreover, that these allegations justify extraordinarily low contribution limits.

However, the issue is not whether there is political corruption in Akron but whether Respondents — as proponents of extreme limits on political expression — *have sustained*

their burden to establish that the limits are narrowly tailored to achieve the compelling state interest.

The District Court correctly understood this issue:

> The Court has determined that the level of corruption in the City of Akron, if any, is not relevant to the Constitutional inquiry that must be made. For even if there is no corruption whatsoever, the citizens have an interest in keeping things that way. Courts have consistently held that preventing corruption or even the appearance of corruption is a compelling state interest. . . .
>
> . . . So long as *Buckley v. Valeo* is the law of the land, however, campaign contributions and expenditures must be treated as a form of political expression protected by the First Amendment. Any limitations must be subject to the closest scrutiny, and *the Court must determine if there would be less intrusive measures which might accomplish the same objective.* (Emphasis added.)

Frank v. City of Akron, 95 F. Supp. 706, 711 (N.D. Ohio 1999) (App. 28a-29a).

As the Charter Amendment's proponents, Respondents were obligated to "prove that these challenged provisions of the Charter Amendment are narrowly tailored to serve that interest." *Frank*, 95 F. Supp. at 713 (App. 32a), *citing McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S. Ct. 1511, 1519, 131 L. Ed. 2d 426 (1995); *Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995), *cert denied*, 518 U.S. 1033 (1996); *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S. Ct. 612, 637, 46 L. Ed. 2d 659 (1976).

The record does not establish the propriety of the specific limitations imposed, but merely relates to the claimed rationale for the Charter Amendment's adoption, which was never challenged. Respondents did not offer any real history of recent campaign funding activity in Akron municipal elections, either by way of complete data or meaningful anecdotal evidence. Nor did they offer expert opinions concerning contribution limits, or any other probative evidence to support their position. Simply put, the District Court had no record from which to conclude that there was any reason for a trial and ample reason to conclude from the limits themselves that they were facially unconstitutional.

It is clear that the Court of Appeals did not rely upon claimed corruption. Rather, the Court of Appeals imposed its own view — unsupported by the record — of the impact of the limits on candidates' ability to campaign in Akron to uphold the Charter Amendment provisions.

Respondents now argue that Petitioners failed to submit evidence to support their constitutional challenges. However, there was no need given Respondents' failure to provide any evidence that the challenged provisions were narrowly tailored. As in *Shrink Missouri*, "There might, of course, be need for a more extensive evidentiary documentation if [Respondents] had made any showing of their own to cast doubt on the apparent implications of [Petitioners'] evidence and the record here," but they did not do so. 528 U.S. at 394, 120 S. Ct. at 908.

And, there is a much more fundamental problem. While Respondents submitted numerous documents to the District Court, that material was properly challenged by Petitioners because it was not admissible under *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997).

Eight pages of Petitioners' Reply Brief In Support of Motion for Summary Judgment detailed the deficiencies in Respondents' "evidentiary appendices." Much of the material was irrelevant — going to the rationale for the Charter Amendment, which was not at issue. The evidentiary materials were replete with hearsay and unauthenticated material. Indeed, Respondents submitted a purported report of Preliminary Findings of the National Civic League without authentication, which included obvious "cut and paste" assemblages of portions of the document and omitted other portions, and yet was presented to the District Court as if it were the entire document. Some — but very critically, not all — of the campaign finance reports for certain candidates in the 1997 Akron municipal elections were submitted, creating a truncated and useless picture.

The opinions of Respondents Parsons and Kilby about appropriate spending levels based on their campaigns are irrelevant — expenditure levels may not be constitutionally imposed, as these contribution limits attempt in practice to do. Nor were they offered as experts, as they could not be.

It is apparent that neither the District Court nor the Court of Appeals relied on any of this inadmissible and irrelevant material. There is no reference to it by the Court of Appeals. The District Court referred to it in passing, but did not draw upon it. *Frank*, 95 F. Supp. at 709 (App. 24a). Respondents' flawed proffer formed no basis for any decision below and it has no purpose here.

Simply, Respondents argue that there are allegations of corruption associated with one alleged contribution of $1,000, thereby justifying limits of $100 and $300. However, the record is completely devoid of any rationale to support the $100 and $300 limits. By the logic of their argument, even more potential corruption would be avoided with even lower limits.

In another example of overreaching, Respondents claim that disgust with claimed public corruption was the reason for the Charter Amendment's success at the polls. That is nothing but speculation. There is no legislative history to the Charter Amendment beyond its own preamble, which does not recite the existence of corruption in Akron City Government, only the desire to avoid it.

II. The Decision Of This Court in *Shrink Missouri* Did Not Eliminate The Obligation Of Courts To Evaluate The Constitutionality Of Contribution Limits.

Respondents argue that *Shrink Missouri* has rendered all preceding authority evaluating particular contribution limits irrelevant, *citing Daggett v. Comm'n on Governmental Ethics and Election Practice*, 205 F.3d 445 (1st Cir. 2000). However, *Shrink Missouri supplemented* this Court's prior teachings, specifically those in *Buckley* — it did not overrule them. In particular, it reaffirmed the important role of courts in evaluating such limits, and any suggestion by *Daggett to the contrary is plainly wrong.*

In *Shrink Missouri*, this Court reaffirmed that contribution limits should only be upheld if: (1) they narrowly focus on the state's interests; (2) allow contributors to freely associate with any candidate; and (3) allow candidates to collect enough funds to wage an effective campaign. Directly explaining and reaffirming the earlier decision in *Buckley*, the Court said:

> We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless. *Such being the test, the issue in later cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with*

> *all the dollars likely to be forthcoming.* As Judge Gibson put it, the dictates of the First Amendment are not mere functions of the Consumer Price Index. (Emphasis added.)

Shrink Missouri, 528 U.S. at 397, 120 S. Ct. at 909.

And, *Shrink Missouri* did not alter the obligation of the proponent of such restrictions to demonstrate that they do not impede a candidate's ability to wage an effective campaign. This Court specifically noted that:

> since the Missouri limits became effective, 'candidates for state elected office [have been] quite able to raise funds sufficient to run effective campaigns,' and that 'candidates for political office in the state are still able to amass impressive campaign war chests' . . .

Shrink Missouri, 528 U.S. at 396, 120 S. Ct. at 909.

Thus, there was actual evidence that the limits at work in *Shrink Missouri* had not adversely affected the ability of candidates to run campaigns and raise funds.

Just as contribution limits are not a function of the Consumer Price Index, they are also not a mere function of population. Respondents' attempts to equate contribution limits in Vermont or in Montana with limits in Akron ignore fundamental differences in campaign expenditures. The Akron contribution limits are not a mere function of city population, but should represent a more complex analysis about the costs of campaigning in the Cleveland media market, with which the District Court was familiar, but the Court of Appeals clearly was not.

Even a comparison based on populations alone demonstrates the extreme nature of Akron's contribution limits. Montana has a total population that is roughly 4 times that of Akron — but allows its candidates 8 times more than the amount allowed for Akron ward candidates. *Montana Right to Life Assoc. v. Eddleman*, 306 F.3d 874 (9th Cir. 2002). And Florida, with 8 times the population, allows candidates 10 times the amount available to Akron candidates. *Florida Right to Life, Inc. v. Mortham*, 2000 WL 33733256 (M.D. Fla. March 20, 2000). Any discussion of Vermont's limits is absolutely improper in light of the Second Circuit's withdrawal of *Landrell v. Sorrell*, 2002 WL 31268493 (2d Cir. October 3, 2002). However, even Vermont with less than three times the population set limits 4 times higher than those imposed in Akron. *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000). And neither Vermont nor Montana possesses cities that are comparable to the costly Cleveland media market in which Akron is located.

III. Mandatory Disclosure Of Home Addresses Impermissibly Burdens Expression.

The Respondents urge that mandatory public disclosure of home addresses for *all contributors* is constitutional and therefore should not be considered on *certiorari*. As the District Court noted, there is an important distinction between mandatory disclosure of home addresses to the public and disclosure to the candidate for purposes of compliance:

> In this regard, Plaintiffs make the distinction between disclosure of the contributor's home address to the public, versus disclosure of the home address *to the candidate*. Plaintiffs make it clear that they do not challenge the constitutionality of requiring that a contributor disclose a home address *to the candidate*.

> Plaintiffs recognize the disclosure of a residence address to the candidate is essential for purposes of the candidate's own record-keeping and audit, as well as for satisfying the requirement that a candidate disclose compiled information about the geographic sources of his/her contributions. Thus, Plaintiffs are only challenging the requirement that a contributor's home address be *publicly* disclosed and identified. (Emphasis in original.)

Frank, 95 F. Supp. at 718 n.16 (App. 46a n.16).

The District Court also noted that there were many less intrusive ways of communicating information about the sources of contributions to the public that would not reach so deeply into residential privacy — and thus, that the provision was not narrowly tailored to serve a compelling state interest. *Id.*, 95 F. Supp. 2d at 718-19 (App. 47a).

Respondents unwittingly acknowledge the important distinction between the disclosure of a mailing address and home address. Respondents argue in passing that if threats of harassment were sufficient to invalidate the disclosure of home addresses under the Charter Amendment, then the disclosure of mailing addresses under *Buckley* would be equally invalid because for most people their home and mailing addresses are the same. This misses the point. For most people, mailing and home addresses are the same *by choice* — *Buckley*'s mailing address allows the contributor to choose whether to disclose a home address in connection with political contributions. The Charter Amendment eliminates that choice — and thus imposes a heightened and unnecessary burden on speech.

The same is true with respect to voting registration records. There is a clear and compelling government interest in associating home addresses with voting registration. Although voter registration records disclose home addresses, that does not automatically render the disclosure of home addresses required by the Charter Amendment constitutional. Voter registration records do not reflect actual votes, but contributions show actual expenditures and so invite reprisal. And, it may be a very sad commentary, but the victim of a stalker or an abuser may well conclude that the risk to personal safety is so great that even a very small contribution to an Akron candidate is unsafe. The Charter Amendment thus forecloses an opportunity to participate in political speech where there are, as amply noted by the District Court, less intrusive means of accomplishing the desired ends.

IV. This Petition Provides The Opportunity To Address A Critical Element Of Campaign Finance Reform.

Finally, Respondents argue that there is no relationship between this Court's decision to grant certiorari in *Federal Election Comm'n v. Beaumont*, 278 F.3d 261 (4th Cir.), *cert. granted*, No. 02-403 (Nov. 18, 2002) and this petition. They also argue that the pending litigation concerning the Bipartisan Campaign Finance Reform Act is immaterial to the Akron Charter issues. Respondents are entirely mistaken because the Sixth Circuit in *Frank* has linked these matters and demonstrates the necessity for the Court to provide clear guidance. 290 F.3d 813, 818 (6th Cir. 2002). At its heart, this case — like the others — is about *expenditure* control and the need to balance the First Amendment's protection of political participation against the need to guard against corruption, as the District Court clearly understood. "To limit expenditures indirectly, by imposing extremely low contribution limits, would also be

unconstitutional." *Frank*, 95 F. Supp. 2d at 714 (App. 35a). The decision below in this case simply throws out the protection of participation and so must be reversed.

CONCLUSION

Respondents' Brief In Opposition demonstrates the critical importance of resolving these issues in order to ensure uniform application of constitutional principles to campaign finance laws to ensure that the vitality of political speech is not vitiated by efforts at reform.

Respectfully submitted,

MAX ROTHAL,
DIRECTOR OF LAW, CITY OF AKRON
CHERI B. CUNNINGHAM,
ASSISTANT DIRECTOR OF LAW,
CITY OF AKRON
161 South High Street, Suite 202
Akron, Ohio 44308
(330) 375-2030

Counsel for Petitioner
City of Akron

ROBERT M. GIPPIN
Counsel of Record
KAREN KELLY GRASSO
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
(216) 566-5500

Counsel for Petitioners
John V. Frank, et al.